No. 16,275

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEAN EJNARD BJORSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Northern District of California, Southern Division

CLARK A. BARRETT

315 Montgomery Street
San Francisco 4, California

Counsel for Appellant

INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes and Regulations

No. 16,275

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEAN EJNARD BJORSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Northern District of California, Southern Division

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Northern District of California, Southern Division. (TR 9-11)[1] The District Court had jurisdiction pursuant to Title 18, United States Code, Section 3231. The indict-

[1] Numbers preceded by "TR" denote the applicable pages of the Transcript of Record.

ment charged an offense in violation of the Universal Military Training and Service Act (Title 50, United States Code App., Section 462). (TR 3-4) This Court has jurisdiction of this appeal pursuant to Rules 37 (a) (1) and (2) of the Federal Rules of Criminal Procedure as the notice of appeal was filed in the time and manner required by law. (TR 11-12)

STATEMENT OF THE CASE

Appellant was charged by an indictment alleging that on or about October 21, 1957, he knowingly refused and failed to comply with the order of his Selective Service Local Board to report to said board "to be given instructions to proceed to a place of employment designated by said Local Board No. 30 for the purpose of doing civilian work contributing to the maintenance of the national health, safety and interest," as provided in the Universal Military Training and Service Act and the rules and regulations made pursuant thereto. (TR 3-4)

After pleading not guilty and waiving trial by jury, appellant was tried by the Court on August 7, 1958. (TR 6-8) His entire Selective Service file was received in evidence as Plaintiff's Exhibit 1. (TR 19) It was stipulated that appellant failed to report to his local board on October 21, 1957, as ordered. (TR 18) Appellant was found guilty as charged on August 7, 1958 (TR 49), and was sentenced to imprisonment for one year on October 21, 1958. (TR 54)

Appellant became eighteen years of age on May 2, 1950, and registered with his local board in Richmond, California, the same day. (F 1, 2)[2] On May 11, 1951, he completed his classification questionnaire in which he indicated, *inter alia,* that he had been an ordained minister of Jehovah's Witnesses since 1946, was then attending

[2] Numbers preceded by "F" appearing in parentheses herein refer to the pages of the Selective Service file (Plaintiff's Exhibit 1). Such page numbers, written in longhand, generally appear at the bottom of each page in the file.

the Albany Theocratic Ministry School in Albany, California, that he had no business or employment "aside from Ministry," and certified that he was a conscientious objector. (F 6-11) His special form for conscientious objector was filed May 21, 1951. (F 12, 23-27) He was classified I-A by his local board on May 28, 1951. (F 12) In spite of a recommendation by the Hearing Officer that appellant be granted conscientious objector status (F 37), the appeal board continued his I-A classification on July, 23, 1952. (F 12, 42)

Appellant was subsequently classified IV-F for physical reasons from August, 1952, to July, 1953, at which time he was again classified I-A. (F 12, 44, 65-66) He refused to submit to induction as ordered in August, 1953 (F 12, 80, 82), and was subsequently tried and convicted of a felony based upon such refusal on February 19, 1954.[3] The late District Judge Edward P. Murphy sentenced appellant to a fine of $2,000.00 and a two-year suspended sentence. (F 13, 99) On March 9, 1954, he was sentenced to two years' imprisonment for failure to pay said fine. (F 103)

Appellant was classified IV-F by his local board on April 13, 1954, by reason of his conviction. (F 13) After serving ten and one-half months imprisonment he was released on parole on February 27, 1955; his parole terminated April 7, 1956. (F 104, 149)

On June 27, 1956 (presumably at the request of the Local Board, although the file does not so indicate), the United States Army Recruiting Main Station in San Francisco, wrote to the Commanding General, Sixth Army, a "Request for Determination of *Eligibility for Induction*" concerning the appellant herein.[4] (F 138-140) Item 14 of said request contains a statement by the investigating officer that appellant was "Considered Acceptable for Military Service." (F 140)

[3] *United States* v. *Bjorson,* United States District Court, Northern District of California, Southern Division, Criminal No. 33757.

[4] In this instance, as in all others in this brief, emphasis is supplied.

The Commanding General, Sixth Army, by his Acting Assistant Adjutant General, recommended approval of said request in his first indorsement to the Adjutant General, Department of the Army in Washington, D. C. on June 28, 1956. (F 141)

The next persons to consider appellant's eligibility for induction were those comprising the "Joint Induction Screening Group," as representatives of the Army, Air Force, Navy, and Marine Corps. All of said representatives approved the aforesaid request on July 12, 1956. (F 136)

The Secretary of the Army formally approved the request for waiver of appellant's previous conviction on July 13, 1956, in a second indorsement addressed to the Commanding General, Sixth Army. Said approval was couched in the following words:

> "1. Request for waiver of civil record is approved and *induction* into the *Armed Forces* (Army, Air Force, Navy or Marine Corps) is authorized provided otherwise qualified. This is *not* to be construed as authorization for *induction* into any *armed service* not currently accepting personnel for *induction.*" (F 134)

The Commanding General, Sixth Army, forwarded this letter and the action of the Joint Induction Screening Group to the Army Recruiting District on July 19, 1956. (F 134) On July 20 the original investigating officer signed a certificate of acceptability, noting that appellant had been "Found fully acceptable for *induction* into the *Armed Forces.*" (F 167)

By August 21, 1956, appellant was again classified I-A by his local board. (F 13) On August 28, 1956, he sent a letter requesting a personal appearance before the board. (F 170) Out of an abundance of caution he also wrote a separate letter requesting an appeal from said I-A classification on the same date. (F 169) The local board records note the receipt of both of these letters. (F 13) Following his personal appearance on September 11, 1956,

at which time he presented a great deal of documentary evidence concerning his ministerial activities, appellant was reclassified I-O by the local board. (F 13, 173-188)

On September 19, 1956, appellant addressed a letter to his local board appealing his I-O classification. (F 198) The appeal board confirmed his I-O classification on July 18, 1957. (F 13, 213)

The local board forwarded SSS Form No. 152, special report for Class I-O registrants, to appellant on July 25, 1957 (F 13, 213), *more than one year* after the Secretary of the Army had considered and approved the request for determination of appellant's eligibility for *induction* into the *Armed Forces.* Paragraph two of said special report mentions, for the first time since appellant's registration in May of 1950, any requirement for *civilian work in lieu of induction.* (F 213) Appellant returned this report, uncompleted, on August 5, 1957. (F 216)

On August 10, 1957, appellant was given three choices of civilian work which he might perform. (F 219) He refused all of them on religious grounds. (F 220) At a subsequent meeting with members of the local board and the representative of the State Director, on September 16, 1958, the appellant reaffirmed his position. (F 227-228) The *next day* the local board determined that employment as an institutional helper at the Los Angeles County Department of Charities would be appropriate for appellant, and requested authority to order him to work there. (F 229) The Director of the Selective Service System approved this request on October 3, 1957. (F 234) The letter of transmittal of this authorization from that State Director to the local board reads in part as follows:

> "A copy of the letter of instructions to the registrant should be mailed *to the agency selected* at least four days in advance of the date set for the registrant to report to the office." (F 235)

The local board's order to report for civilian work,

dated October 9, 1957, notified appellant that he had been "assigned" to the Los Angeles County Department, and specified that he was to report to receive instructions on October 21. (F 237) As previously mentioned, it was stipulated that the appellant did not so report.

In the entire Selective Service file, there is only one document that indicated any action by the Los Angeles County Department of Charities. This is the statement of employer found on the bottom of the aforesaid order to report for civilian work. The only notation on this undated statement is the typewritten phrase "DID NOT REPORT." (F 239)

QUESTIONS PRESENTED AND HOW RAISED

I.

Whether the appeal board denied the IV-F classification without basis in fact contrary to Section 1622.44 of the Selective Service Regulations, resulting in the I-O classification being arbitrary, capricious and contrary to law and making the final order to do civilian work void.

This question was raised by the motion for judgment of acquittal. (TR 36, 40-41, 47-48)

II.

Whether a waiver authorized by the Secretary of the Army, expressly limited to induction into the Armed Forces, may be construed to be a waiver as regards civilian employment in a municipal agency.

This question was raised by the motion for judgment of acquittal. (TR 34, 37-38, 47)

III.

Whether the evidence produced at the trial was legally insufficient to support the judgment of guilty.

This question was raised by the motion for judgment of acquittal. (TR 34, 37)

SPECIFICATION OF ERROR

The District Court erred in denying appellant's motion for judgment of acquittal duly made at the close of the Government's case. (TR 33-41) Grounds in the motion are made the basis of the statement of points on appeal. (TR 15-16)

ARGUMENT

Introduction

The order to report for civilian work, the violation of which was the basis of the indictment in the present case, can only be valid if both of two assumptions are true:

(1) That the Universal Military Training and Service Act allows waivers of prior felony convictions under any circumstances, and

(2) That, if such waivers are possible, either (a) the Secretary of the Army's waiver was sufficient under these circumstances, or (b) no waiver at all was required from the Los Angeles County Department of Charities.

The appellant believes that his conviction must be reversed as neither of the aforesaid assumptions is valid.

I. Section 6(m) of the Universal Military Training and Service Act does not provide for discretionary waivers of prior felony convictions by the Armed Forces or civilian agencies.

Appellant is familiar with the decision of this Court in *Korte* v. *United States*[5] in which it was held that Section 6(m) of the Universal Military Training and Service Act[6] (hereinafter referred to as the Act) does provide for discretionary waivers of prior felony convictions. A petition for certiorari to the United States

[5] 260 F. 2d 633 (9th Cir. 1958), cert. denied, 79 S. Ct. 313, 3 L. Ed. 2d 301 (1959).

[6] 50 U. S. C. A. App. § 456(m).

Supreme Court has been denied. Although appellant believes that the issue involved was a substantial one of national importance, and regrets that certiorari was not granted in that case, he will not press that point here.

II. A waiver by the Secretary of the Army, expressly limited to induction into the Armed Forces, does not encompass civilian employment in a municipal agency.

Even if it be assumed that the Act may permit waivers to be granted of prior felony convictions, it does not follow that the waiver was adequate in this instance. Unless it appears that either no waiver whatsoever was necessary, or that the waiver by the Secretary of the Army was sufficient, the local board had no basis in fact for denying appellant the IV-F classification which was otherwise required by Section 1622.44 of the Selective Service Regulations.

A. The Secretary of the Army cannot, without express authorization, grant waivers for any other agency than the armed service under his jurisdiction.

At the time the Secretary of the Army authorized the waiver of appellant's prior felony conviction on July 13, 1956, his authority derived from Title 5, United States Code, Section 181-4(a), the pertinent parts of which are as follows:

> *"Except as otherwise prescribed by law,* the Secretary of the Army shall be responsible for and shall have the authority necessary to conduct all affairs of the *Army* Establishment, including but not limited to those necessary or appropriate for the training, operations, administration, logistical support and maintenance, welfare, preparedness, and effectiveness of the *Army,* including research and development, *and such other activities as may be prescribed by the President or the Secretary of Defense as authorized by law."*

Obviously, the Secretary of the Army could not authorize the induction of any registrant into any of the other armed services without its consent. Although the Army has been named the executive agent of the Department of Defense respecting the procurement of manpower for the Armed Forces, no branch of the Armed Forces may, on behalf of any other service, waive the disqualification arising from a registrant's prior felony conviction without express authorization.

The Joint Induction Screening Group as originally established had representives of all four branches of the armed services. It was established for the purpose of allowing each branch of service to determine whether moral waivers of prior felony convictions should be granted to Selective Service registrants. After nearly a year of operation, the Department of the Air Force waived its right to have its own representative on the Screening Group and agreed the accept the decisions of the Army's representative (Department of the Air Force, COMMENT No. 1-Joint Induction Screening Group, dated October 21, 1952).[7] Without this express waiver, the Army representative could not possibly act on behalf of the Air Force. If this is so, on what basis can the Secretary of the Army be assertly endowed with the power to act for the Director of the Los Angeles Department of Charities? Neither the Act nor any of the regulations promulgated pursuant thereto can be construed to mean that the President or Secretary of Defense can authorize the Secretary of the Army to act for or waive the rights of an agency of the Los Angeles County government. The appellant is aware of no authorization by that department, or any other civilian organization or agency, which enables the Secretary of the Army to act for it in these circumstances. If such exist, the Government's trial record is devoid of them.

The only documents indicating correspondence with the Department of Charities by any of the armed services or

[7] Set forth as Appendix A of this brief, *infra,* p. 20.

the Selective Service System is the notation that the local board forwarded copies of the order to report for civilian work on October 17, 1957 (F 14), and that the statement of employer was completed and returned subsequently. (F 239) Indeed, the natural import of the language in appellant's file would even negative any assertion that there might have been an implied waiver in this case; the letter of October 7, 1957, from the State Director to the local board refers to the agency "selected" (F 235), and the order in question specifies that the appellant had been "assigned" to this particular employer. (F 237) There is absolutely no evidence that the Department of Charities participated in any way in such selection or assignment. This is further established by the fact that the next day after appellant refused the civilian service offered, he was assigned to the civilian employer in question. (F 227-229)

B. A waiver of a prior felony conviction limited by its terms to induction into the Armed Forces cannot operate as a waiver for civilian employment in lieu of induction.

As was pointed out in the Statement of the Case, *supra,* each and every document concerning the waiver under discussion, from the initial request by the local recruiting office in San Francisco to the final certificate of acceptability which was forwarded to appellant's local draft board, speaks of nothing but induction into the armed services. The initial request sets the tone of the proceedings with the statement that the registrant is "Considered Acceptable for Military Service." (F 140) No mention is made that consideration was given to civilian service in lieu of induction. The entire series of correspondence and indorsements is limited to military personnel considering the desirability of waiving appellant's prior felony record as far as actual service in the Armed Forces is concerned. It is difficult to imagine language that would more ex-

pressly limit the waiver to actual induction than that used by the Secretary of the Army and contained in the certificate of acceptability.

Appellant believes that the military personnel involved in the granting of the waiver in question did not consider any possible service in lieu of induction for two reasons: one, that this possibility was never presented to them, and two, that they implicitly realized they did not have authority to issue such a waiver binding upon a civilian agency. A review of the Selective Service file in this case indicates that at the time the request for waiver was made in June, 1956, appellant had had only two classifications in his life—I-A from May 28, 1951 to April 13, 1954 (except for a nine-month period in 1952 and 1953 during which he was classified IV-F for physical reasons), and IV-F by virtue of his prior conviction. Therefore, at the time the Secretary of the Army considered this request, there was nothing to indicate that appellant would not be again classified I-A by his local board—as he actually was a month after his certificate of acceptability was received. It was not until appellant was granted a personal appearance by the local board and presented no less than fourteen letters concerning his ministerial activity and beliefs (F 173-188) that he was reclassified I-O. As previously noted, more than a year had elapsed from the time of the Secretary of the Army's waiver before the file discloses any reference to civilian work.

In considering Section 6(m) of the Act, the regulations, the language of the Secretary of the Army's waiver, and the total lack of anything in the record to indicate that the Department of Charities did or did not, expressly or impliedly, waive appellant's prior record, if the evidence in support of this conviction is questionable, the presumptions should be resolved in favor of the registrant. As this Court stated in *Franks* v. *United States*:[8]

"In a criminal prosecution of this kind, the burden

[8] 216 F. 2d 266 (9th Cir. 1954), at page 269.

> is on the Government to establish the validity of the induction order, and if the matter which we here mention has a bearing on that validity, then *we must view the record in the light most favorable to the appellant* . . . "

See also *United States* v. *Fielder*[9] in which it was held:

> ". . . the registrant has not clearly established that the Board was actually prejudiced but neither has the Government satisfactorily proved to the court that the remarks made did not express the actual feeling or attitude of at least one member of the Board which made the decision as to defendant's classification. *Any doubt, in a case of this kind, must be resolved in favor of the defendant.*"

In *United States* v. *Alvies*,[10] Judge Carter (the author of the *Korte* opinion) cited many cases in support of the proposition that

> "Where the record of selective service board action in classifying a registrant is questionable, presumptions are resolved in (his) favor."

Appellant believes that to hold the Army waiver as sufficient for civilian work would be to grant the Armed Forces and local boards the power to assign any convicted felon—be he murderer, habitual thief, pervert, etc.—to a civilian agency, if it be assumed that that agency has indicated that it has work openings available. The difference in the type and location of assignment and the degree of supervision, restraint, and discipline which the Armed Forces are able to impose, as compared to civilian agencies, is so apparent as to eliminate the need for further comment on this point. Judge Carter stated in his opinion in *Korte* v. *United States* that "the military agencies are entrusted with the task of selecting personnel

[9] 136 F. Supp. 745 (E. D. Mich. 1954), at page 747.

[10] 112 F. Supp. 618 (N. D. Cal. 1953), at page 624. See also *United States* v. *Graham*, 108 F. Supp. 794 (N. D. N. Y. 1952).

to defend the United States, and if they believe a registrant would not be suitable because of his prior felony conviction, they are not required to take him." [11] Surely, if the Armed Forces have this choice, the Los Angeles County Department of Charities cannot be compelled to take a convicted felon into its employ just because the Secretary of the Army, fifteen months earlier, believed that on the record available to him the man might be a safe risk for induction.

"Waiver" is defined in Bouvier's Law Dictionary as "the intentional relinquishment of a known right, with both knowledge of its existence and an intention to relinquish it." [12] Neither the knowledge of the existence of this right in this particular case, nor the intention to relinquish it on the part of the Department of Charities appears in appellant's Selective Service file. The lack of proof of such a waiver by the Department of Charities is not something which can be supplied by speculation or conjecture in a case involving the liberty of a defendant. Appellant's motion for judgment of acquittal should properly have been granted under these circumstances.

C. Appellant's I-A classification on August 21, 1956, did not eliminate the necessity for a waiver applicable to service in lieu of induction.

Counsel for the Government, in response to appellant's motion for judgment of acquittal, repeatedly stated that, because this registrant was classified I-A following the waiver by the Secretary of the Army, "that commenced the whole thing anew"; "this defendant stood before the Selective Service Board . . . as a new registrant"; and "that started him off as if he had just come in and registered with that Board." (TR 44) Appellant submits such statements are excellent illustrations of two logical fallacies—*non sequitur* and *petitio principii,* and indicate

[11] 260 F. 2d 633 (9th Cir. 1958), at page 637.
[12] Third Revision, 1914, p. 3417.

a fundamental misconception as to several of the issues raised in appellant's motion.

The Court's attention is directed to the fact that the cases cited by the Government at the trial[13] and by this Court in the *Korte* case,[14] *supra,* are not applicable to this phase of appellant's argument. In none of these cases was the particular point at issue here even raised. In the *Korte* case particularly (repeatedly claimed by the Government to be identical with this action (TR 41-45)) the issue involved here was neither briefed nor argued, nor considered by this Court in its opinion. The only question considered was whether Section 6(m) of the Act should be construed to allow waivers of prior felony convictions at all. In short, the Government has cited no cases—and appellant knows of none—which have considered who must issue the waiver, and what its scope or contents must be in order to make a registrant liable for civilian work. To say, therefore, that, if a local board had the authority to classify a man I-A by virtue of a prior Army waiver of his conviction, it therefore had the authority to assign him arbitrarily to a civilian position after changing his classification to I-O, is illogical in fact and unsupported in law.

An equally serious gap in reasoning appears when it is claimed that simply because of a I-A classification the appellant reverted, in effect, to the status of a new eighteen-year-old registrant, without a prior felony record. To make this assertion is to beg the very question in issue—that is, the validity of an Army waiver as applied to civilian work.

It must be remembered that there is nothing magic about the I-A classification; nothing in the regulations endows this classification with the power to expunge fel-

[13] *Korte* v. *United States,* 260 F. 2d 633 (9th Cir. 1958); *United States* v. *Palmer,* 223 F. 2d 893 (3rd Cir. 1955); *United States* v. *Goodrich,* 146 F. 2d 265 (5th Cir. 1945).

[14] *Doty* v. *United States,* 218 F. 2d 93 (8th Cir. 1955); *United States* v. *Palmer,* 223 F. 2d 893 (3rd Cir. 1955); *United States* v. *Bouziden,* 108 F. Supp. 395 (W. D. Okla. 1952).

ony records from a Selective Service file. In this case, following his conviction, appellant had to be classified IV-F.[15] If the waiver by the Secretary was allowable under the Act, it was a condition precedent to a I-A classification. Likewise, a waiver by the civilian employer in question would also be a condition precedent to a I-O classification.

In order to substantiate the Government's position, Section 6(m) of the Act[16] regarding "training and service" would have to be limited to training and service following *induction* into the Armed Forces, as the Secretary of Army's waiver could not operate beyond this field. And unless a waiver concerning *induction* was the only necessary prerequisite, the contention that a I-A classification "commenced the whole thing anew" would be unsupportable. Actually, however, the "service" mentioned in this Section must also include civilian work in lieu of induction. The full text of Section 6(m) is as follows:

> "No person shall be relieved from *training and service* under this title (section 451-454 and 455-471 of this Appendix) by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year."

Section 6(j) relating to conscientious objectors, expressly differentiates between combatant and non-combatant training and service, and civilian work as opposed to induction. Moreover, there are more than fifty separate and distinct instances in which the Act expressly limits "training and service" to active service in the Armed Forces. As a result of such differentiation between those on active service and conscientious objectors, the latter are given no disability and death compensation;[17] they may be or-

[15] Selective Service Regulations, Sections 1623.2, 1622.44 (32 C.F.R. § § 1623.2, 1622.44).

[16] 50 U. S. C. A. App. § 456(m).

[17] 50 U. S. C. A. App. § 454(e).

dered to report for civilian work before they attain nineteen years of age;[18] they do not receive physical examinations at the end of their period of service;[19] they have no reemployment right;[20] they are not guaranteed the right to vote in person or by absentee ballot, nor freed from the obligation of paying any poll tax;[21] they are subject to the requirement of such service beyond the statutory termination date for those eligible for active service;[22] and they have no rights similar to those contained in the Soldiers' and Sailors' Civil Relief Act.[23]

That Congress intended the phrase "training and service," when not limited to the Armed Forces, to include all types of service under the Act, can also be illustrated by considering the sections other than 6(m) in which this phrase was not so modified. There are only a handful of such instances, concerning optometry and premedical students, and the like,[24] and the various sub-paragraphs of Section 6 relating to active duty personnel, foreign diplomatic representatives, the National Guard, Ready Reserve, Reserve Officers Training Corps, students, elected officials, judges, and ministers. The only other provisions of the Act in which "training and service" is not limited are those that are obviously general in scope; i. e., that all selections shall be made in an impartial manner, without discrimination;[25] that no exemption or deferment shall continue after the cause therefor ceases to exist;[26] that no one may act as a substitute for another, or avoid service by the payment of money;[27] and that the local

[18] 50 U. S. C. A. App. § 455(a)(1).
[19] 50 U. S. C. A. App. § 459(a).
[20] 50 U. S. C. A. App. § 459(b)-(h).
[21] 50 U. S. C. A. App. § 459(i).
[22] 50 U. S. C. A. App. § 467(c).
[23] 50 U. S. C. A. App. § 464.
[24] 50 U. S. C. A. App. § 454(i)(3).
[25] 50 U. S. C. A. App. § 455(a).
[26] 50 U. S. C. A. App. § 456(k).
[27] 50 U. S. C. A. App. § 458.

and appeal boards may consider questions concerning all exemptions and deferments.[28]

If any doubt remained concerning the general scope of Section 6(m), the language of Section 4(i)(4) should alleviate it, for that section expressly provides that, for the purposes of that subsection only, "active service" includes service performed pursuant to Section 6(j) of the Act,[29] concerning work performed in lieu of induction. Therefore, as "training and service" in Section 6(m) is not limited, it must include civilian work, and a waiver by the applicable civilian employer was essential in this instance. As it was not obtained, appellant's I-O classification was arbitrary, and the order to report for civilian work void.

One final point should be mentioned. In substantiation of its position that the I-A classification started the classification process anew, counsel for the Government stated that no appeal was taken therefrom. (TR 44) This may be technically correct, but it is misleading. As stated above, appellant filed both a request for a personal appearance and an appeal from the I-A classification. (F 169, 170) The local board recognized that both a notice of appeal and such request had been made. (F 13) However, the local board properly disregarded the notice of appeal as premature; that opportunity for a personal appearance took precedence.[30] Upon the showing by appellant, the local board reclassified him I-O, and an appeal from that classification was immediately taken. Certainly appellant should not be deprived of any of his rights to a proper classification and a valid order to report merely because he demonstrated to the local board that the I-A classification was erroneous, rather than ignoring his right to a personal appearance and relying upon an immediate appeal. In view of this, if the appellant had been clas-

[28] 50 U. S. C. A. App. § 460(b)(4).
[29] 50 U. S. C. A. App. § 456(j).
[30] Selective Service Regulations, Sections 1624.1(a), 1624.2(e) (32 C. F. R. § § 1624.1(a), 1624.2(e)).

sified I-O immediately, would the Government then contend that the I-O classification "started everything anew"? There is no requirement that every person classified I-O be first placed in the I-A category; indeed, the regulations are to the contrary.[31]

III. The evidence produced at the trial was legally insufficient to support the judgment of guilty.

This point on appeal is based upon the discussion in paragraph II of this brief, *supra*. Concisely stated, as the evidence failed to disclose any proper waiver by the Los Angeles County Department of Charities, the action of the trial judge in finding the appellant guilty as charged is unsupported. If any such waiver exists, appellant has the right to know when it was made, by whom, and pursuant to what authority. Nor can there be any presumption of administrative regularity here, as the Selective Service file does not disclose that the assigned employer ever considered this question, and no regulations have been shown indicating that this would be done in the normal course of events. In this particular case, therefore, the motion for judgment of acquittal was improperly denied.

CONCLUSION

Even if it be assumed that Section 6(m) of the Act should be interpreted so as to permit waivers of prior felony convictions, unless the phrase "training and service" in that section applies only to service in the Armed Forces following induction—and it clearly is not so limited—the waiver by the Secretary of the Army cannot apply to civilian service in lieu of induction. Therefore, as the Selective Service file does not disclose a waiver by the Los Angeles County Department of Charities, the Appeal Board must have denied the required IV-F classification

[31] Selective Service Regulations, Section 1622.14(a) (32 C. F. R. § 1622.14(a)).

without basis in fact, thereby making the I-O classification arbitrary and the order to report for civilian work void.

Wherefore, the appellant prays that the judgment of the District Court be reversed, and the cause remanded with directions to the trial court to enter a judgment of acquittal and discharge the appellant.

Respectfully submitted,

Clark A. Barrett

315 Montgomery Street
San Francisco 4, California

Counsel for Appellant

April, 1959.

APPENDIX A

Department of the Air Force
Disposition Form

File No. Subject: Joint Induction Screening Group

From Dept of the Air Force Comment No. 1
Hq USAF, AFPTR-P-2 Date 21 Oct 1952

To Dept of the Army Maj Greenburg/edg/73426
MPPD, AGO
Guam Hall, Benning Road

1. Reference is made to the Joint Induction Screening Group which was established for the purpose of complying with the provisions of paragraph 10(d), SR 615-180-1.

2. Since the inception of this group on 21 November 1951, Major Greenburg, Airman Procurement Branch of the Directorate of Training has been the Air Force representative. During this period approximately 6000 moral waivers were considered and of this number only 17 cases were not unanimously voted for or against granting of a waiver. During the period that the group has been in operation it has become apparent that the Army policy in considering moral waivers for induction is closely aligned with Air Force policy.

3. In view of the above, the Air Force desires to waive so much of paragraph 10d(1), SR 615-180-1, 5 November 1951, as amended, that reads "by the respective department." The Air Force has confidence in the decisions made on moral waivers for induction by the Army and at such time that the Air Force requires personnel through the Selective Service System the Air Force will accept the moral waivers acted upon by the Department of the Army.

4. Major Greenburg will continue to be the Air Force's representative on the Joint Induction Screening Group. He will not act on individual cases forwarded for consideration, however, he will be available in a policy advisory capacity if

requested. At such time as the Air Force accepts personnel through the Selective Service System an officer will be provided to act upon individual cases presented to the group.

For the Chief of Staff:

/s/ Milton Fryer, Jr. Lt. Col USAF

for Joseph W. Kellogg
Col. USAF
Executive
Directorate of Training

COPY